

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AKO MBILI GILMORE,

Defendant-Appellant.

UNPUBLISHED

August 11, 2009

No. 285080

Ingham Circuit Court

LC No. 06-001329-FC

Before: Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence for felony murder, MCL 750.316(1)(b), and conspiracy to commit armed robbery, MCL 750.157a. We affirm.

Defendant’s convictions arise from the shooting death of Allen Redd, on September 11, 2006, in a garage located at 1318 Ohio Street in Lansing. The prosecution’s theory at trial was that defendant and Lance Jones conspired to rob Redd of money and drugs at gunpoint and that Redd was killed during that robbery.¹ The defense claimed that while defendant admittedly was present at the time of Redd’s murder, he was not a participant in any plan or attempt to rob Redd, but instead merely tried, unsuccessfully, to intervene in an altercation between Jones and Redd.

Testimony and evidence presented at defendant’s trial established: that defendant worked as a drug runner or “mule” selling drugs for Redd and that he sold heroin to Jones; that there was an unusually large amount of telephone contact between defendant and Redd and between defendant and Jones in the days leading up to Redd’s murder; that there was no telephone contact between Jones and Redd in the six months preceding Redd’s murder; that the home at 1318 Ohio Street (“1318”), where Redd was murdered, was owned by Jones’s stepfather; that Jones borrowed the key to 1318 shortly before Redd’s murder; that Jones also borrowed a .22 caliber Ruger rifle, which was the murder weapon, from his stepfather two days before the murder; that other actions were taken in apparent preparation for the meeting with Redd, including hanging tarps in the garage of 1318 where the meeting was to occur and purchasing fireworks that were then used in an attempt to camouflage the noise generated by the

¹ Jones was tried separately and, on August 28, 2007, was convicted of murder, conspiracy to commit armed robbery and felony firearm.

shooting; that Jones had taken defendant to the garage on at least two previous occasions; that on the day of Redd's murder two men fitting defendant's and Redd's descriptions were seen scuffling outside the garage, in the vicinity where two buttons from defendant's shirt were found, and that one of the men forced the other back into the garage; that Redd was shot and killed inside the garage; that Redd's blood was on the shirt, pants and shoes defendant was wearing at the time of Redd's murder and that the blood spatter on his clothes indicated defendant was in close proximity to Redd at the time he was shot; that money was taken from Redd's pockets; and that, after Redd was shot, men fitting defendant's and Jones's descriptions sped away from 1318 in Jones's mother's 1992 Oldsmobile Cutlass.

On appeal, defendant first argues that there was insufficient evidence to establish his guilt of the predicate felony of conspiracy to commit armed robbery. We disagree.

When considering a claim of insufficient evidence, this Court must view the evidence presented at trial in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Conflicting evidence must be resolved in favor of the prosecution. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). And, we "must draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.*

MCL 750.157a provides that any person who conspires together with one or more persons to commit an offense prohibited by law or to commit a legal act in an illegal manner is guilty of conspiracy. Conspiracy requires proof of both the intent to combine with others and the intent to accomplish the illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Thus, to establish defendant's guilt of conspiracy to commit armed robbery, the prosecutor was required to prove that defendant intended to combine with Jones to rob Redd while armed and that defendant intended that the armed robbery occur. *Id.*

There was no dispute that defendant was present when Redd was shot; the only question was whether he was "merely" present or whether he was an active participant in a planned armed robbery of Redd, and ultimately, in Redd's murder. From our review of the record, we conclude that there was sufficient evidence to convict defendant of the predicate felony of conspiracy to commit armed robbery. We note specifically: (1) the absence of any phone contact between Jones and Redd in the six months preceding Redd's murder and the substantial increase in the amount of phone contact between Jones and defendant and defendant and Redd in the days leading up to the murder; (2) testimony that defendant and Redd "scuffled" outside the garage, as substantiated by the two buttons from defendant's shirt on the ground in that vicinity, with one of them pulling or forcing the other into the garage; and (3) testimony that defendant and Jones left the scene together, in Jones's mother's car and the absence of any testimony placing any vehicle driven by defendant in the vicinity, suggesting that they also arrived at the scene together. Drawing all reasonable inferences and making credibility choices in support of the jury verdict, as this Court is required to do, the evidence presented was sufficient to permit a rational jury to infer that defendant arranged for Redd to come to 1318 on September 11, 2006, for the purposes

of combining with Jones to rob Redd of heroin and/or money at gunpoint, and that defendant further participated in the crime by forcing Redd into the garage, where Jones then shot him.

Defendant next asserts that evidence that prosecution witness Charles Smith perjured himself at Jones's trial, discovered after defendant's trial was completed, warrants a new trial, and that the trial court abused its discretion by concluding otherwise. We disagree.

This Court reviews a trial court's decision whether to grant a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 644 NW2d 174 (2003). A trial court abuses its discretion when it reaches a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). As our Supreme Court has explained:

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Cress*, *supra* at 692 (internal quotations and citation omitted).]

Jones was tried separately and was convicted of conspiracy to commit armed robbery, felony murder and felony firearm. Charles Smith testified at Jones's trial that he knew defendant as a result of purchasing heroin from him and he knew Jones from "seeing him around different people who use" and that he "met him again in jail." Smith testified further that, while he and Jones were both in jail, Jones confessed in detail to Redd's murder, telling Smith that defendant and Jones planned to rob Redd of heroin and money, but "pretty much everything went wrong"; that Redd did not want to "give everything up" and that Jones shot Redd after Redd and defendant started fighting.

On November 7, 2007, Arthur Garrett, who had been housed with defendant for a short time in December 2006, and then with Smith thereafter, executed an affidavit in which he averred that Smith repeatedly told Garrett that he did not know anything about Jones's case and that he was being untruthful about Jones having confessed in order to try to get out of jail. Jones moved for a new trial on the basis of Garrett's affidavit. That motion was denied following a May 15, 2008 evidentiary hearing, at which Garrett and others testified.

At defendant's trial, Smith testified that he knew defendant "[t]hrough dealing drugs and stuff, heroin"; that he would meet up with defendant "[o]nce, twice, three times a week or so," depending on how much money he had, to buy heroin for his personal use; that Smith called defendant on his cell phone to arrange drug buys; and that the last time Smith bought heroin from defendant was near the end of August 2006. Cellular telephone records showing that Smith called defendant 22 times in a six-month period ending on August 29, 2006 corroborated this testimony. Smith testified further that, he knew Jones as a fellow drug user and purchaser of heroin from defendant, an assertion that defendant did not dispute. Additionally, Smith testified that on one occasion, late in August 2006, Smith, his brother, defendant and another person were riding in a van together and Smith overheard defendant telling someone "he was coming into, you know, quite a bit of heroin, about 200 grams or so."

In July 2008, defendant also moved for a new trial based on Garrett's affidavit, arguing that Smith's perjury was material to the outcome of defendant's trial. An evidentiary hearing was held on this motion on November 6, 2008. At this hearing, Garrett reiterated that Smith told him that he was giving false information to detectives so he could get out of jail. The trial court denied defendant's motion, noting the evidence implicating defendant in Redd's murder, including eyewitness testimony, phone records and blood spatter evidence, and concluding it was not probable that a new trial would result in a different outcome.

On appeal, defendant argues that the trial court erred by concluding that introduction of evidence that Smith perjured himself would not make a different result probable on retrial. We disagree.

Michigan Courts have held that "[t]he discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994), citing *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). As with other newly discovered evidence, however, "[i]n order to merit a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence." *Id.*

The only uncorroborated testimony offered by Smith at defendant's trial was that he overheard defendant tell someone that he was "coming into" a large quantity of heroin. Absent this testimony, there remained substantial evidence implicating defendant in planning an armed robbery of Redd, including the unusual amount of phone contact between Jones and defendant and Jones and Redd in the days leading up to the murder, the absence of any phone contact between Redd and Jones in the six months preceding the murder, eyewitness testimony about the "scuffle" outside the garage and about seeing defendant and Jones leave the scene together, the buttons from defendant's shirt found outside the garage, and the amount and pattern of Redd's blood on defendant's clothing. Even were the jury to disbelieve Smith's testimony about overhearing defendant's purported statement, there remained sufficient evidence to convict defendant of the crime. Nothing in Garrett's affidavit or testimony directly corroborated defendant's version of events or undermined the prosecution's version of events.² Defendant's assertion that there is significant and credible evidence that a prosecution witness perjured himself at trial about central issues in the case significantly overstates the importance of Smith's testimony, as well as the impact of Garrett's affidavit on that testimony. Considering the brief and limited nature of Smith's uncorroborated testimony against defendant, and considering the

² This is in stark contrast to the nature of the newly discovered evidence at issue in the cases relied on by defendant. In *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994), the newly discovered evidence directly corroborated the defendant's assertion that he shot the victim in self-defense. In *People v Terry Burton*, 74 Mich App 215; 253 NW2d 710 (1977), the newly discovered evidence directly corroborated the defendant's assertion that he was not involved in the robbery in any way. And, in *People v LoPesto*, 9 Mich App 318; 156 NW2d 586 (1967), the newly discovered evidence called into question the credibility of evidence this Court deemed of "real importance" on a crucial issue to the outcome of the trial.

other evidence against defendant as described above, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Defendant argues further that the trial court abridged his Sixth Amendment right to have a jury determine facts relevant to his guilt by concluding that it was not probable that a jury would reach a different conclusion on retrial. Essentially, defendant asserts that the trial court's analysis – and by implication, any “harmless error” analysis – invaded the province of the jury as the exclusive finder of fact. As noted by the prosecutor, the case law primarily relied on by defendant in support of this argument addresses constitutionally deficient jury instructions.³ However, defendant does not assert that his jury instructions were constitutionally deficient. Nor does defendant offer any authority that a trial court is not permitted to evaluate newly discovered evidence in the manner undertaken here. Indeed, *Cress, supra*, requires the very analysis undertaken by the trial court in response to a motion for a new trial based on newly discovered evidence. Absent instruction from the Supreme Court otherwise, this Court remains bound to apply the test for granting a new trial based on newly discovered evidence set forth in *Cress*. See, e.g., *People v Metamora Water Service, Inc*, 276 Mich App 376, 387-388; 741 NW2d 61 (2007) (“It is the duty of the Supreme Court to overrule or modify case law if and when it becomes obsolete, and the Court of Appeals and the lower courts are bound by the precedent established by the Supreme Court until it takes such action.”). Thus, defendant's argument that the trial court improperly invaded the province of the jury lacks merit.

Defendant next argues, in the alternative, that his trial counsel was ineffective for failing to examine Jones's court file, which would have resulted in the discovery of Garrett's affidavit, prior to defendant's trial. We agree with the trial court that, as discussed above, defendant has not established a reasonable probability that the outcome of his trial would have been different had defense counsel become aware of Garrett's affidavit.

The question whether a defendant has been denied effective assistance of counsel “is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel.” *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When considering the trial court's conclusion that defendant's trial counsel was not ineffective, this Court reviews the trial court's factual findings for clear error and reviews de novo questions of constitutional law. *Id.*

As our Supreme Court recently explained in *Dendel, supra* at 124-125, quoting *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated

³ Defendant also refers in passing to *Apprendi v New Jersey*, 530 US 466, 498; 120 S Ct 234; 147 L Ed 2d 435(2000), and its progeny, which address judicial fact-finding during sentencing.

by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

See also, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). “A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.” *People v Robert Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Id.* “Failure to make a reasonable investigation can constitute ineffective assistance of counsel.” *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant asserts that his trial counsel’s failure to “take 20 minutes to look at” Jones’s court file, without more, constituted a failure to make a reasonable investigation under the “prevailing professional norms.” Defendant does not indicate that he asked his counsel to review Jones’s file, or that counsel had any indication that something of value to the defense was contained in the file. Rather, defendant asserts that his counsel was required, in the ordinary course of preparing a defense and in order to be deemed to have exercised reasonable diligence under prevailing professional norms, to examine Jones’s court file. However, defendant cites no authority for the proposition that the failure to examine a co-defendant’s court file, without some prior indication that information favorable to the defendant is contained in that file, renders counsel’s investigation unreasonable. He presented no testimony or affidavits to the effect that, under the circumstances presented here, examination of a co-defendant’s file is required by an objective standard of reasonableness. Thus, defendant has failed to establish that his counsel’s failure to examine Jones’s court file constitutes deficient performance.

Even were this Court to assume that counsel was required to examine Jones’s file as part of a reasonable investigation, however, we further conclude that defendant cannot establish that he was prejudiced by that failure. Defendant asserts that had his counsel discovered Garrett’s affidavit in Jones’s court file, and used it, or called Garrett to testify at trial, to impeach Smith’s testimony against defendant, there is a reasonable probability that the outcome of the trial would have been different. However, as discussed above, Smith’s testimony against defendant was limited to the details of their relationship as drug dealer and buyer, which was corroborated by cell phone records, to testimony that Smith knew Jones as a fellow user and fellow buyer from defendant, which was not disputed, and to testimony that Smith overheard defendant comment that he was “coming into” a large quantity of heroin. Thus, it is only this last statement that may have been impacted by testimony that Smith told Garrett that he was lying about having

information concerning Redd's murder. Considering the other evidence presented implicating defendant in the plan to rob Redd and establishing his participation in the events leading to Redd's murder, defendant has not established a reasonable probability that the outcome of his trial would have been different had his counsel presented testimony by Garrett (either in person or by way of affidavit) that Smith told him he was "making up" his testimony about the case. Therefore, defendant has not met his burden of showing prejudice resulting from the alleged deficient performance, and consequently, his claim of ineffective assistance of counsel lacks merit.

Defendant next argues that the prosecution violated his due process rights to disclosure of exculpatory evidence as articulated by the United States Supreme Court in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when it failed to disclose the existence of Garrett's affidavit before trial. As this Court has explained,

In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

There is no dispute that the prosecution possessed Garrett's affidavit before defendant's trial, or that it had value for impeachment purposes. Both the United States Supreme Court and this Court have held that a prosecutor is required to turn over impeachment evidence favorable to the defendant. See, e.g., *United States v Bagley*, 473 US 667, 678; 105 S Ct 3375; 87 L Ed 2d 481 (1975); *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002). As this Court has explained:

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *Brady*, [*supra*]. This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence "may make the difference between conviction and acquittal." *Bagley*, [*supra* at] 676. [*People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998).]

Thus, because impeachment evidence is considered exculpatory evidence under *Brady*, certainly the prudent course of action for the prosecution to take upon receipt of Garrett's affidavit would have been to notify defense counsel of the existence of that affidavit or to provide him with a copy of it. That said, however, the prosecution's failure to do so only warrants relief if there is a reasonable probability that it affected the outcome of the trial. As this Court explained in *Lester*, *supra* at 281-282:

The failure to disclose impeachment evidence does not require automatic reversal, even where, . . . the prosecution's case depends largely on the credibility

of a particular witness. The court still must find the evidence material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Accordingly, undisclosed evidence will be deemed material only if it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. . . .

In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness'[s] credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [Citations and internal quotation marks omitted.]

Defendant asserts that Smith's testimony was the only evidence linking defendant to any plan to rob Redd. However, this assertion greatly overstates the import of Smith's testimony, which was almost completely corroborated by other evidence. Further, as discussed above, considering the evidence against defendant, including the cellular telephone records, and the evidence and eyewitness testimony substantiating defendant's role in the events leading up to Redd's murder, defendant cannot establish that the likely effect of Garrett's affidavit on Smith's credibility would have undermined a critical element of the prosecutor's case, *Lester, supra*, or that its disclosure would have, with reasonable probability, resulted in a different outcome at trial, *Cox, supra*. Therefore, no relief is warranted.

In his supplemental brief on appeal, defendant argues that the prosecutor committed misconduct by introducing evidence that Jones possessed an AR-15 assault rifle after the events in question, and by noting for the jury, in his opening statement and closing argument, that Jones "jimmied" open the lock on a gun safe to access the .22 Ruger rifle used to kill Redd. We disagree.

A defendant preserves the issue of prosecutorial misconduct by making a timely, contemporaneous objection and request for a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to these asserted instances of prosecutorial misconduct below, therefore they are unpreserved. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *Callon, supra* at 329. To avoid forfeiture of review of an unpreserved allegation of prosecutorial misconduct, defendant must demonstrate a plain error that affected his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). That is, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where a claim of misconduct is predicated on the admission of

evidence, relief is not available unless the defendant shows that the error affected the outcome of the proceedings. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermined the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). While a prosecutor may not knowingly offer inadmissible evidence, *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977), he is entitled to prove his case “by whatever admissible evidence he chooses.” *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). Further, “prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant.” *Noble, supra* at 660-661 (citations omitted).

Defendant has not established that the admission of cursory evidence that Jones possessed an AR-15 rifle following Redd’s murder prejudiced him in any way. Defendant acknowledges that it was established at trial that this rifle had no connection to the offenses of which defendant was charged or to defendant, and at no point did the prosecutor argue or imply otherwise. Evidence that Jones possessed the weapon shortly after Redd’s murder was presented simply as part of the circumstances surrounding the investigation. Thus, there is no indication that introduction of this evidence was undertaken in bad faith, for the purpose of prejudicing the defendant. And, evidence that Jones possessed the rifle, having no connection to defendant or to the crimes at issue, cannot be said to have prejudiced defendant’s defense. Therefore, defendant has not established prosecutorial conduct warranting relief predicated on the introduction of testimony relating to the AR-15 rifle.

Regarding comments by the prosecutor discussing Jones’s acquisition of the .22 Ruger rifle used in Redd’s murder from his stepfather, these comments accurately described the testimony of Jones’s stepfather, who testified that Jones asked to borrow the gun two days prior to Redd’s murder and that he told Jones that he could borrow the gun, but he did not know where the key to the gun safe was, so Jones “jimmied” open the lock. Prosecutors are afforded great latitude during argument, and they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to the theory of the case. *Ackerman, supra* at 450; *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). Here, the prosecutor’s theory was that Jones and defendant conspired to rob Redd of his heroin and money at gunpoint, and that when Redd resisted, Jones shot him. The prosecutor’s comments pointed to evidence tying Jones to the murder weapon and substantiated the existence of a plan between defendant and Jones, at least two days before the crime, to rob Redd at gunpoint. The prosecutor’s accurate comment on this evidence did not in any way deprive defendant of a fair trial, and defendant’s assertion of prosecutorial misconduct lacks merit.

Defendant also argues that he was deprived of his constitutional right of due process to a jury drawn from a venire representative of a fair cross-section of the community in which the case was tried, by the exclusion of African-Americans from his jury venire. We disagree.

“A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). To establish a prima facie violation of this fair cross-section requirement, defendant has the burden of proving the following:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Underrepresentation of a distinctive group may be measured by measuring the disparity between the number of group members in the jury array and the number of group members in the community. *Hubbard, supra* at 474. However, the requirement that a defendant be tried by a fair cross section of his community does not guarantee that any particular jury “actually chosen must mirror the community . . .” *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard, supra* at 472. Rather, “the Sixth Amendment guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community.” *Hubbard, supra* at 472-473.

Here, defendant is a member of a distinctive group, and he has offered some evidence, by way of census data, that the group of which he is a member was underrepresented in *his* jury venire. However, defendant has offered no evidence that African-Americans generally are underrepresented in Ingham County Circuit Court jury venires, or that such underrepresentation is the result of systematic exclusion. As this Court explained in *People v Flowers*, 222 Mich App 732, 736-737; 565 NW2d 12 (1997).

While a criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community, he is not entitled to a petit jury that exactly mirrors the community. In order to show a prima facie violation of the fair-cross-section requirement, a defendant must show, among other things, that the underrepresentation of the distinctive group, in this case African-Americans, was due to systematic exclusion. Furthermore, it is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate. Here, defendant’s bald assertion that systematic exclusion must have occurred because no African-Americans were in the array is not sufficient to support his challenge. [Citations omitted.]

See also, *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000) (Evidence establishing that African-Americans were underrepresented in the defendant’s particular array is not sufficient, alone, to establish a prima facie case of systematic exclusion); *Howard, supra* at 533 (“Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.”). Here, as in *Williams, supra* at 527, to establish his claim, “[d]efendant has the burden of demonstrating a problem inherent within the selection process that results in systematic exclusion.” Defendant has not presented any such evidence of systematic exclusion, and his failure to do so renders his claim meritless.

Further, with respect to defendant's request for a remand in order to conduct an evidentiary hearing on this matter, no affidavit or offer of proof regarding the Ingham County jury selection process or regarding the composition and selection of the jury array in this particular case has been submitted. Therefore, defendant has failed to establish a need for an evidentiary hearing. See MCR 7.211(C)(1)(a)(ii).

Finally, defendant asserts that he was denied the effective assistance of counsel by his trial counsel's failure to object to the prosecutor's comments regarding Jones's acquisition of the Ruger rifle from the gun safe, to introduction of evidence pertaining to the AR-15 rifle and to the absence of African-Americans among the veniremen. We disagree.

Defendant did not raise these supplemental claims of ineffective assistance of counsel in his motion for a new trial or at the hearing on that motion. Accordingly, they are unpreserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Id.*

As noted above, to establish a claim of ineffective assistance of counsel, defendant is required to establish that his counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *Toma*, *supra* at 302. To establish prejudice a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for counsel's errors. *Id.* at 302-303. Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). And, counsel's failure to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant bases his supplemental claims of ineffective assistance on his counsel's failure to object to the alleged instances of prosecutorial misconduct and to the make-up of the jury venire discussed above. However, defendant's assertions of prosecutorial misconduct and his complaint about the jury venire lack merit. Accordingly, defendant's counsel was not ineffective for failing to address these alleged errors. *Goodin*, *supra* at 433; *Snider*, *supra* at 425.

Additionally, as regards the introduction of evidence relating to the AR-15 rifle, generally, the decision whether to object to evidence is a matter of trial strategy. *Matuszak*, *supra* at 58. The failure to object to evidence can constitute ineffective assistance of counsel only where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996). Here, evidence that Jones possessed the rifle, regardless whether it was connected to the crime, was consistent with, and helpful to defendant's assertion that Jones was a cold-blooded killer, who acted alone in robbing and murdering Redd. Therefore, counsel's decision not to object to it may well have been a strategic decision, which should not be second-guessed by this Court. *Matuszak*, *supra*. Moreover, even assuming that evidence relating to the AR-15 rifle was inadmissible, as discussed above, and that the failure to object to its admission was not a reasonable strategic decision by defense counsel, defendant has not established that its admission was "so prejudicial that it could have affected the outcome of the case." *Ullah*, *supra*

at 685-686. Therefore, defendant has not established that he received ineffective assistance of counsel at trial.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio